

Fair Political Practices Commission

MEMORANDUM

To: Chairman Randolph and Commissioners Downey, Karlan, Knox, and Swanson

From: Natalie Bocanegra, Commission Counsel
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Subject: Second Pre-notice Discussion of Proposed Regulation 18709 – “Segmentation” Rules (Previously Regulation 18702.6)

Date: July 18, 2003

I. SUMMARY

Pursuant to Commission staff advice, where an official has a financial interest in a particular decision, the official is not prohibited from participating in other related decisions in which he or she does not have a financial interest, provided the Commission’s “segmentation process” is followed.

Proposed regulation 18709 codifies staff advice explaining this process which can be applied to a series of related decisions regardless of the subject area of the decisions. The Commission considered similar language embodied in proposed regulation 18702.6 at its June 2003 meeting. At that time, the Commission requested that this language be presented for a second pre-notice discussion. The numbering of the proposed regulation 18702.6 was changed to conform to the Commission’s existing eight step conflict-of-interest analysis. (See Discussion.) Other minor revisions to the previously presented regulation are addressed in this memorandum. Specifically, several options relating to the definition of the term “inextricably interrelated” are presented.

As noted in its May 23, 2003 memorandum to the Commission, the segmentation process is viewed by staff as a viable approach for permitting participation by an otherwise disqualified official if certain requirements are met. This regulation applies to all decisions but may be particularly helpful in segmenting general plan decisions. Specific general plan issues, raised by the County of San Diego and also considered at the June 2003 meeting, will be further addressed by forthcoming proposed regulations to be presented to the Commission.

II. BACKGROUND

The Political Reform Act (the “Act”)¹ prohibits a public official from making, participating in making or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Section 87100 et seq.) In general, a public official has a financial interest in a decision, resulting in a conflict of interest for the official, if it is reasonably foreseeable that the decision will have a material financial effect on the official, unless a particular exception applies. (*Ibid.*)

Where the decision in which the official has a conflict of interest is related to other decisions, it may become somewhat confusing as to how broadly the Act’s disqualification rules apply. As a result, Commission staff has developed a process to guide officials in determining whether they may participate in decisions in which the official is not disqualified.

III. COMMISSION ADVICE

A. SEGMENTATION PROCESS

The Commission first introduced the idea that a public official might be able to participate in decisions related to a decision in which he or she has a financial interest in 1976 in its *Owen* opinion. (*In re Owen* (1976) 2 FPPC Ops. 77.) Analyzing whether several public officials were prohibited from participating in decisions regarding the adoption of a specific land use plan for the future of the city’s “core area,” the Commission concluded that the officials would be making decisions which would foreseeably have a material financial effect upon their economic interests if they participated in the identified decisions. However, the Commission noted:

“This is not to say that all decisions concerning the core area and the plan will have a material effect on these interests. Some or most may very likely have de minimis impact on the public officials’ various interests.” (*Owen, supra.*)

Commission staff has subsequently advised that an official may utilize a “segmentation” process to segregate² a decision in which he or she had financial interest from other related decisions.³ The following advice is commonly provided to officials who have a financial interest in one of a series of decisions:

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

² The Commission uses the terms “segment” and “segregate” interchangeably; “segmentation” and “segregation” describe the same procedure. “Bifurcation” is also used, albeit less frequently, to refer to this procedure.

³ See *Huffaker* Advice Letter, No. A-86-343; *Patterson* Advice Letter, No. I-01-179; *Woodruff* Advice Letter, No. A-01-157; *Jackson* Advice Letter, No. A-01-056.

“...[u]nder certain circumstances, a public official disqualified from one decision may participate in other related decisions provided that the official’s participation does not affect the decision in which he or she has a conflict of interest. (*In re Owen* (1976) 2 FPPC Ops. 77.) However, certain decisions are too interrelated to be considered separately, and in that event, a public official’s conflict on one decision will be disqualifying for the other.

“Decisions are inextricably interrelated where, among other things, one decision is a necessary condition precedent or condition subsequent for another. Thus, a public official would have to disqualify himself or herself if the result of one decision would effectively determine or nullify the result of another. For example, in a decision to select one of two autopark sites, a decision to select one of the sites is essentially a decision against the other autopark site. (*Boogaard* Advice Letter, No. I-90-347.) Similarly, decisions regarding one aspect of a general plan may be so interrelated to other decisions that they may not be bifurcated, because one decision will effectively decide the other. (With respect to segmentation of decisions, *see e.g.*, *Merkuloff* Advice Letter, No. I-90-542; *Lindgren* Advice Letter, No. A-99-313; *Sweeney* Advice Letter, No. A-89-639; *Stone* Advice Letter, No. A-92-133a; *Ball* Advice Letter, No. A-98-124; and *Ennis* Advice Letter, No. A-94-203.)

“Assuming that a decision can be logically segregated from other related decisions, the public body must then procedurally segregate the decision prior to allowing the public official with a related conflict to participate in the decision-making process. This entails three steps:

“(1) the decisions in which the public official has a disqualifying financial interest should be segregated from the other decisions on the public body’s agenda;

“(2) the decisions from which the public official is disqualified should be considered first, and a final decision should be reached by the public body without the disqualified official’s participation in any way; and

“(3) once a decision has been reached on the issues in which the official is disqualified, the disqualified official may participate in the deliberations regarding the other related issues so long as his or her participation does not result in a reopening of the previous issues or in any other way affect the decisions concerning the previous issues in which the public official was disqualified from participation.”

(*Woodruff, supra.*)

In essence, the purpose of the segmentation process is to allow an official to participate in certain decisions which may be “related” but continue to prohibit the official’s

participation in decisions that are “inextricably interrelated” to one in which the official is prohibited from participating under the Act.

B. “IMPLEMENTATION DECISIONS”

Also associated with the segmentation process is the idea that a public official should be allowed to participate in certain decisions which merely carry out an earlier decision made without the disqualified official’s participation, provided that none of the official’s economic interests will be materially affected by this participation.

Under this concept, a public official with a disqualifying conflict of interest in a particular decision may participate in subsequent decisions which implement, but do not revise, the fundamental decision in which the official had a conflict of interest. For example, in the *Martello* Advice Letter, No. A-92-471, the Commission advised that an official could lawfully participate in decisions on financing a theater complex, to the extent that such decisions did not alter the original decision to build the project, did not materially affect the scope of the project, or independently have a material financial effect on any economic interest of the official. Such decisions are “implementation decisions” in which the official does not have a disqualifying conflict of interest. (See also *Warne* Advice Letter, No. I-02-052; *McCain* Advice Letter, No. I-00-257; *Ramirez* Advice Letter, No. A-00-243; *Olson* Advice Letter, No. A-00-237.)

The concept of an “implementation decision” is often not distinct from the segmentation rules but, rather, applies to a particular type of fact pattern where application of the segmentation process is appropriate. Where decisions are indeed “implementation decisions,” an official can participate in those decisions so long as they do not independently create a conflict of interest. (*Olson, supra.*)⁴ In other words, the public official will still need to assess whether the implementation decision will have a foreseeable and material financial effect on his or her economic interests. (*Ibid.*) This assessment is always required when the segmentation rules are applied.

Generally, implementation decisions occur at the final stages of the decisionmaking process. However, it is important to note that whether a particular decision in a series of decisions is truly an “implementation decision” is fact dependent. A public official must look at the series of decisions and whether a particular decision will have a financial impact on his or her economic interest to such an extent that the official will be prohibited from participating in the decision under the Commission’s rules. For example, if a public official (a member of a redevelopment agency) has a financial interest in a decision to approve a project and the redevelopment agency votes to conduct an environmental impact report (“EIR”) (a basic decision from which the official must disqualify himself or herself), the official may be able to participate in the

⁴ When assessing material financial impacts, a public official measures the financial effect of the implementing decision only, not the initial decision. Initial decisions usually are of greater magnitude; e.g. a project approval. This process, therefore, permits subsequent participation in implementing decisions. (*Athan* Advice Letter, No. A-86-094.)

decision to choose the engineer or consultant to whom the city will award the contract to perform the EIR provided no other conflict of interest exists. (*Athan, supra.*)

The proposed regulation codifies staff advice regarding the segmentation process and special rules pertaining to budget and general plan decisions. It is consistent with and is not meant to alter advice relating to implementation decisions.

IV. USE OF SEGMENTATION PROCESS: SPECIFIC DECISIONS

A. GENERAL PLAN DECISIONS

The segmentation process may allow public officials to participate in certain related decisions. (See discussion in May 23, 2003 Memorandum to Commissioners.) In the context of general plan decisions, staff has additionally advised that once all the specific decisions related to a general plan have been finalized, the final vote to adopt, reject, or amend the plan will not require disqualification so long as the plan is not modified at that time. (See *Thomson* Advice Letter, No. I-00-239; *Diaz* Advice Letter, No. A-94-101; *Joehnck* Advice Letter, No. A-92-460; *Marino* Advice Letter, No. I-89-291.) For example, in the *Stone* Advice Letter, No. A-92-133a, the Commission staff advised:

“When a public official is disqualified from participating in a decision relating to the revision or adoption of a general plan because the decision will affect the official’s economic interests materially, the decision may be segregated from other general plan decisions and a final decision on the disqualifying matter must be reached without the participation of the disqualified public official. Once general plan decisions in which an official has an economic interest are segregated and resolved without the participation of the disqualified public official, the official may then participate and vote on other decisions regarding adoption of the general plan, including the final vote to adopt the general plan.”

The rationale for this rule is that the general plan, as implemented through each separate decision, will affect the public officials involved in a manner which is not distinguishable from the effect on the public generally. (*Joehnck, supra.*) This rule applies regardless of whether the decision is to initially adopt a general plan for a jurisdiction (*Diaz, supra.*) or to amend an existing plan (*Joehnck, supra.*)

B. BUDGET DECISIONS

The segmentation process has also been applied to budget decisions so that an official may be able to participate in decisions and discussions of an agency’s general budget, provided the budgetary decisions in which the official has a disqualifying financial interest are segregated and the official follows the segmentation procedure described above, such that the official does not participate in those aspects of the

budgetary decisions in which he or she has a disqualifying financial interest. (*Russell* Advice Letter, No. A-95-157.)

Finally, the public official may also vote on the adoption of the final budget, despite the fact that the final budget includes items from which the public official is disqualified, provided the decision cannot result in a reopening or in any way change the decisions from which the public official was previously disqualified. (*Billing* Advice Letter, No. A-00-203; *Russell, supra*; *Cook* Advice Letter, No. A-83-163.)

V. PROPOSED ADOPTION OF REGULATION 18709 (FORMERLY PROPOSED REGULATION 18702.6)

Staff believes that codification of the segmentation rules is useful for public officials. Although the segmentation procedure is frequently outlined in advice letters, it is not provided for by regulation. During the Commission's Phase 2 Conflict of Interest Improvement Project, the segmentation issue was identified as an important issue warranting some examination. (Memorandum to the Commission regarding "Planning: Conflict of Interest Regulatory Improvement Project, Phase 2," July 21, 1999.) However, due to the large number of other issues that required more immediate regulatory action, staff recommended that segmentation be assigned a lower priority, and no further regulatory work on this item occurred.

Staff continues to believe that segmentation is an important issue and that codification of this advice would make it more accessible to officials attempting to comply with the Act, especially with regard to complex general plan and budget decisions. During the general plan discussion at its June meeting, the Commission agreed with staff's recommendation and asked that the proposed regulation be brought back to the Commission. The language of proposed regulation 18709 (Attachment 1) codifies Commission advice explaining how segmentation can be used as a tool to permit disqualified officials to vote on certain decisions.

Renumbering: Proposed regulation 18702.6 has been renumbered to regulation 18709 to conform with the Commission's eight step conflict of interest analysis. Although there is some foundation for placing the proposed regulation at Step Two relating to the "making of a governmental decision," staff consensus is that it is more appropriate to place rules for the segmentation process at the end of the conflict-of-interest analysis. Staff believes this placement is more appropriate since an official will only turn to segmentation *after* he or she has determined that it is reasonably foreseeable that a material financial effect will result from the decision and that no exceptions apply. These determinations are made after Step Seven.⁵

Subdivision (a) outlines the Commission's segmentation procedure. Subdivision (a)(1) provides that only decisions which are NOT "inextricably interrelated" can be

⁵ If the Commission decides to adopt this language, staff will review regulation 18700, the "roadmap" regulation for the Commission's conflict-of-interest rules, to determine if any additional regulatory changes are necessary to maintain conformity.

segregated under the segmentation procedure. Subdivisions (a)(2) – (4) specify the steps which must be completed. Minor technical changes have been made to maintain consistency among subdivisions (a)(1) – (4).

Subdivision (b) clarifies when decisions are “inextricably interrelated” in order to identify when segmentation of the decisions cannot be applied.

In relation to general plan decisions, decisions are frequently inextricably interrelated because one decision is contingent upon another. For example, pursuant to Government Code section 65302.8, if a county amends a mandatory general plan element which operates to limit the number of housing units on an annual basis, the amendment must contain findings which justify reducing housing opportunities in the region. Consequently, a decision to initiate the process for developing such findings (i.e. the condition precedent) may be inextricably interrelated to a decision to limit the number of housing units.

Similarly, before adopting a general plan element, the county must consider a final EIR, certify its accuracy, and make explicit findings explaining how the significant environmental effects identified in the EIR have been or should be mitigated, or explain why mitigation is not feasible. (CEQA Guidelines section 15091.) Therefore, because the CEQA compliance process occurs concurrently with the general plan process, prior general plan decisions will be contingent upon the subsequent certification of the EIR (the condition subsequent).

In these examples, segmentation would not be appropriate assuming that the official had a financial interest in one of the interrelated decisions.⁶ The following options for subdivision (b) are included in the proposed regulation:

OPTION 1: LANGUAGE PRESENTED TO THE COMMISSION

“(b) For purposes of this regulation, decisions are inextricably interrelated when, among other things, one decision is a necessary condition precedent, condition subsequent, or alternate to the other, or the result of one decision will effectively determine or nullify the result of another.”

Option 1 was presented to the Commission at its June 2003 meeting. This language is taken from Commission advice letters and is specific in its reference to the types of circumstances under which decisions are “inextricably interrelated.”

⁶ The assumption of a financial interest is a significant factor in determining whether an official even needs to apply segmentation and is an issue to be specifically addressed when the Commission considers the general plan issues raised by the County of San Diego.

OPTION 2: BASIC DEFINITION WITHOUT “CONDITION PRECEDENT” & “CONDITION SUBSEQUENT” LANGUAGE

“(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

Option 2 is similar to Option 1 but omits the terms “condition precedent” and “condition subsequent.” It is staff consensus that, although less specific, this option offers more clarity since the omitted terms can create unnecessary confusion. **Staff recommends Option 2 to be used as subdivision (b) language.**

OPTION 3: INCORPORATING “CONDITION PRECEDENT” & “CONDITION SUBSEQUENT” CONCEPTS

“(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ in circumstances including, but not limited, to the following:
(1) The official has a financial interest in a decision, and a result in a prior decision determines, affirms, nullifies, or alters the decision in which the official has the financial interest; or
(2) The official has a financial interest in a decision, and a subsequent decision will affirm, nullify or alter the decision in which the official has the financial interest, or the subsequent decision is required before the decision in which the official has the financial interest can proceed.”

Option 3 incorporates the concepts of “condition precedent” and “condition subsequent” by describing in a sequential manner the circumstances under which decisions are “inextricably interrelated.”

Subdivision (c) codifies special rules relating to final decisions concerning an agency’s budget and general plan adoption or amendment decisions, provided the adoption or amendment applies to the entire jurisdiction. The phrase “so long as the budget or general plan is not modified at that time” has been deleted to eliminate redundancy.

Finally, the proposed regulation includes a comment stating that this regulation implements the segmentation principle outlined in the *Owen* opinion.

Staff Recommendation: Staff recommends codification of the segmentation rules with the selection of Option 2 language. Codification of these rules will make the segmentation procedure more accessible to officials wishing to fully participate in governmental decisions before them while still affording compliance with provisions of the Act.

Attachment:

Proposed Regulation 18709 – Attachment 1